
Tort Claims for the Coverup of Child Sexual Abuse: Private Litigation, Corporate Accountability, and Institutional Reform

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**TORT CLAIMS FOR THE COVERUP OF CHILD
SEXUAL ABUSE: PRIVATE LITIGATION,
CORPORATE ACCOUNTABILITY, AND
INSTITUTIONAL REFORM**

*Timothy D. Lytton**

ABSTRACT

Tort claims for the coverup of child sexual abuse exemplify the use of civil litigation as an effective response to serious corporate misconduct. This Article analyzes how tort claims against Catholic dioceses, the Boy Scouts of America, and USA Gymnastics empowered child sexual abuse survivors to hold powerful institutional leaders accountable for covering up and facilitating the abuse. The Article demonstrates the importance of access to civil justice when corporate interests capture law enforcement and administrative agencies, as well as the therapeutic value of the litigation process for victims of traumatic injury.

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INTRODUCTION

Among the various forms of corporate misconduct, perhaps none is more morally shocking than the coverup of child sexual abuse. The most notorious example is the clergy sexual abuse scandal within the Catholic Church.¹ For decades, U.S. Catholic bishops and other high-ranking church officials concealed thousands of sexual abuse allegations against priests and surreptitiously moved them to new assignments, where they molested additional victims.² Media coverage detailing this nefarious conduct has raised awareness of corporate coverup and facilitation of child sexual abuse in a wide variety of religious and secular institutions.³

This Article examines the essential role of tort litigation in exposing this form of corporate misconduct and holding accountable the institutional officials who perpetrate it. Part I of the Article briefly describes three child sexual abuse scandals. Part II analyzes how abuse survivors use tort litigation to hold accountable institutional leaders who cover up and facilitate child sexual abuse. Part III highlights two underappreciated aspects of tort litigation that make it an effective response to serious corporate misconduct.

1. For detailed accounts of the child sexual abuse scandal within the Catholic Church, see JASON BERRY, *LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN* (1992, 2000); FRANK BRUNI & ELINOR BURKETT, *A GOSPEL OF SHAME: CHILDREN, SEXUAL ABUSE, AND THE CATHOLIC CHURCH* (1993, 2002); DAVID FRANCE, *OUR FATHERS: THE SECRET LIFE OF THE CATHOLIC CHURCH IN AN AGE OF SCANDAL* (2004); A. W. RICHARD SIPE ET AL., *SEX, PRIESTS AND SECRET CODES: THE CATHOLIC CHURCH’S 2,000-YEAR PAPER TRAIL OF SEXUAL ABUSE* (2006).

2. TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE* 14–45 (2008).

3. *E.g.*, Verena Dobnik & David Klepper, *Yeshiva University Hit with Sexual Abuse Lawsuit*, AP NEWS (Aug. 22, 2019), <https://perma.cc/89QJ-LGZX>; Michael Rezendes, *Seven Years of Sex Abuse: How Mormon Officials Let It Happen*, AP NEWS (Aug. 4, 2022), <https://perma.cc/W2HF-PTJN>; Ruth Graham & Elizabeth Dias, *Southern Baptist Leaders Mishandled Sex Abuse Crisis, Report Alleges*, N.Y. TIMES (May 22, 2022), <https://www.nytimes.com/2022/05/22/us/southern-baptist-sex-abuse.html>; Marc Levy & Michael Rubinkam, *3 Ex-Penn State Officials Sent to Jail in Sandusky Scandal*, AP NEWS (June 2, 2107), <https://perma.cc/LMC3-YUT3>; Nik DeCosta-Klipa, *Sex Abuse at New England Private Schools is Widespread, Globe Spotlight Report Reveals*, BOSTON.COM (May 8, 2016), <https://perma.cc/F2NV-X284>.

Before introducing the three scandals that serve as the basis for my analysis, I wish to offer an important caveat. Studies of tort litigation suggest that its effectiveness as a response to corporate misconduct and its therapeutic value for traumatic injury victims is highly contextual.⁴ I do not assume that tort claims for the coverup of child sexual abuse are representative of all, or even most, tort litigation. However, these claims are a significant litigation phenomenon, as measured by the volume of lawsuits,⁵ the amount of money at stake,⁶ and the media attention devoted to them.⁷ Moreover, they illustrate virtues of tort litigation that I believe are underappreciated and that should be factored into any responsible assessment of the U.S. tort system.⁸

I. INSTITUTIONALIZED COVERUP OF CHILD SEXUAL ABUSE

Coverup of child sexual abuse occurs in a variety of institutional settings. The discussion that follows presents the Catholic Church clergy sex abuse scandal as a template for understanding similar scandals in two other institutions: the Boy Scouts of America and USA Gymnastics. The similarities between these three examples suggest a set of generic characteristics that define this type of corporate misconduct.

The summaries that follow greatly simplify complex institutional failures. My aim in this Article is to focus exclusively on characteristics that support what I take to be useful generalizations. References in the footnotes will lead interested readers to more complete and nuanced accounts of each scandal.

4. See, e.g., ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* 11 (2019) (detailing how increasingly common multidistrict tort litigation disserves plaintiffs); Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 *STAN. L. REV.* 285, 350–53 (2021) (describing the benefits of tort claims against opioid manufacturers, distributors, and sellers).

5. LYTON, *supra* note 2, at 49–54 (assessing the volume of tort claims against dioceses for clergy sexual abuse; *infra* note 57 and accompanying text discussing the volume of tort claims arising out of child sexual abuse against the Boy Scouts of America; *infra* note 83 and accompanying text discussion the volume of similar claims against U.S.A. Gymnastics).

6. See *infra* notes 133–135 and accompanying text discussing the amount of money paid in judgments and settlements by Catholic Church entities, the Boy Scouts of America, and U.S.A. Gymnastics in litigation arising out of corporate coverup of child sexual abuse.

7. See *infra* notes 111–116 and accompanying text analyzing press coverage of tort claims against Catholic Church entities, the Boy Scouts of America, and U.S.A. Gymnastics for corporate coverup of child sexual abuse. See also LYTON, *supra* note 2, at 112–19 (measuring the volume of press coverage of clergy sexual abuse within the Catholic Church) and 96 (documenting the reliance of this coverage on litigation documents and events).

8. See, e.g., ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 28, 152, 171 (2nd ed. 2019) (discussing the value of clergy sexual abuse litigation in the context of an otherwise predominantly critical assessment of the U.S. civil litigation system).

A. *U.S. Catholic Bishops*

The sexual abuse of minors by Catholic clergy in the United States is a phenomenon that encompasses tens of thousands of documented incidents over decades⁹ during which Catholic bishops engaged in a concerted effort to conceal crimes from civil authorities and the public.¹⁰ An analysis of diocesan records suggests that alleged incidents of abuse peaked from 1965 to 1985 at between 500 and 800 per year.¹¹ Bishops discussed the problem in biannual meetings of the National Conference of Catholic Bishops in the early 1970s.¹² During this time, the organization funded a treatment program specifically for Catholic priests who sexually abused minors and issued directives regarding the retention and destruction of treatment reports provided to bishops.¹³ Every bishop involved in these meetings or who referred priests for treatment during this time knew of the problem—but not one of them reported allegations of child sexual abuse to criminal justice authorities.¹⁴

Bishops maintained secret archives containing reports of clergy sexual abuse, a practice which they justified as required by canon law.¹⁵ Church officials and their lawyers admonished survivors who came forward to maintain secrecy and avoid public scandal.¹⁶ They con-

9. JOHN JAY COLL. CRIM. JUST., *THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950–2002* 6 (2004) [hereinafter JOHN JAY STUDY] (reporting 4,392 allegations of child sexual abuse by Catholic priests in U.S. dioceses between 1950–2002 documented in diocesan files based on a survey of diocesan officials). For a summary and analysis of this report’s findings, see LYTTON, *supra* note 2 at 42–54.

10. *E.g.*, John M. Broder, *Los Angeles Files Recount Decades of Priests’ Abuse*, N.Y. TIMES, Oct. 12, 2005, at 8 (describing the cover up by diocesan officials of 126 allegations against Catholic priests of sexual abuse of minors between the 1930s and the early 2000s). *See also* BERRY, *supra* note 1; BRUNI & BURKETT, *supra* note 1; FRANCE, *supra* note 1; SIPE ET AL., *supra* note 1.

11. JOHN JAY STUDY, *supra* note 9, at 28.

12. A. W. Richard Sipe, *Preliminary Expert Report*, BISHOPACCOUNTABILITY.ORG, ¶ 51, <https://perma.cc/EW2S-A9F8> (last visited Aug. 12, 2022); SIPE ET AL., *supra* note 1, at 74.

13. Sipe, *supra* note 12, at ¶ 51; SIPE ET AL., *supra* note 1, at 74.

14. SIPE ET AL., *supra* note 1, at 73–74 (“The fact that preparations for the opening of this program were years in the making demonstrates widespread knowledge [within the Catholic hierarchy] of sexual misconduct with minors by Catholic clergy in the 1950s and definitively by the late 1960s and early 1970s.”). *See* LYTTON, *supra* note 2, at 14–19 (explaining that the first suggestions within the Catholic hierarchy that diocesan officials should report allegations of child sexual abuse by priests to criminal justice authorities did not emerge until 1982 and that prior to that time diocesan officials concealed allegations); *see also id.* at 140–46 (analyzing why and how diocesan officials failed to report allegations of child sexual abuse by clergy).

15. SIPE ET AL., *supra* note 1, at 126, 134–37; LYTTON, *supra* note 2, at 148.

16. CHARLES DERBER, *WILDING OF AMERICA* 86–87 (2007) (detailing how Cardinal Bernard Law, while serving as Archbishop of Boston, instructed his aides to tell victims of clergy sexual abuse to remain silent). *See also* SIPE ET AL., *supra* note 1, at 63 (alleging that diocesan officials “used their influence in the community to protect secrecy and prevent clergy offenders from becoming publicly known”).

spired with local law enforcement to stymie investigations and prevent prosecutions.¹⁷ They suppressed media coverage by threatening newspaper publishers.¹⁸ They shuffled accused priests to other assignments, often over the course of several decades, where the priests continued to abuse children.¹⁹

The first media coverage of church officials' coverup of clergy sexual abuse was a local newspaper story in Lafayette, Louisiana, published in 1984, about a civil lawsuit arising out of parish priest Gilbert Gauthé's sexual molestation of local boys.²⁰ Based on filings in the case, the article featured a photograph of the plaintiffs' attorney with a pull quote declaring "Church officials made a studied effort to conceal Gauthé's misconduct."²¹ A week later, the *New Orleans Times Picayune* printed a front-page story stating that "Catholic Church officials knew for almost seven years about the Rev. Gilbert Gauthé's sexual activities with boys at churches in southwest Louisiana, according to two depositions filed this week in a court case."²² A cascade of national press coverage followed, with stories published by the Associated Press, the *Dallas Morning News*, the *Washington Post*, and the *New York Times*.²³

Successive waves of litigation in the following decades generated growing media coverage of widespread, sustained, and systematic coverup by bishops of clergy sexual abuse.²⁴ In the 1980s and 1990s, bishops settled claims in exchange for nondisclosure agreements, or they petitioned courts to seal case files to limit public scrutiny.²⁵ However, in the early 2000s, survivors increasingly insisted on public disclosure of diocesan records as a condition of settlement, and media outlets successfully sued to have case files unsealed.²⁶

With each successive wave of litigation, the bishops issued public apologies and published new guidelines for the investigation and reporting of abuse.²⁷ However, even as they expressed remorse and

17. LYTTON, *supra* note 2, at 144.

18. *Id.* at 145.

19. *Id.* at 2–3, 22–23, 30–33.

20. *Id.* at 88.

21. *Id.*

22. *Id.* at 89.

23. LYTTON, *supra* note 2, at 89–91.

24. *Id.* at 112–19.

25. *Id.* at 33, 118.

26. *Id.* at 33.

27. Timothy D. Lytton, *Why the Pope's Upcoming Summit Needs to do a Full Accounting of the Cover-Up of Sexual Abuse*, CONVERSATION (Feb. 13, 2019), <https://perma.cc/N6NK-4GUZ>; Timothy D. Lytton, *Catholic Bishops Still Don't Get It*, GLOBE POST (Jan. 1, 2019), <https://perma.cc/ZQP6-BQVA>.

promised reform, bishops persistently attempted to deflect blame onto others, portraying themselves as the victims of unfair media coverage and a contemporary sexual culture responsible for corrupting the Church.²⁸ While declaring their willingness to make amends, they aggressively lobbied state legislatures to oppose legislation extending statutes of limitations on child sexual abuse claims that would allow tens of thousands of victims to seek compensation.²⁹

Government investigations followed in the wake of civil lawsuits. Grand jury and attorney general reports in dozens of states have documented thousands of instances of church officials covering up allegations of sexual abuse by clergy and other individuals under their supervision.³⁰ These investigations revealed many new allegations not previously reported by dioceses despite bishops' public pledges to fully disclose the extent of documented abuse allegations in church files.³¹ As survivors continue to come forward, an increasing number of dioceses have declared bankruptcy to limit claims, avoid discovery, and cap liability.³²

An analysis of diocesan records disclosed by bishops identified 15,235 sexual abuse allegations between 1950 and 2009.³³ However, as government investigations have repeatedly revealed, not all bishops have fully disclosed recorded allegations in their possession.³⁴ Moreover, many survivors of sexual abuse never report their victimization.³⁵ Consequently, some experts believe that the total number of survivors may be as high as 100,000.³⁶

28. LYTTON, *supra* note 2, at 103–04; Lytton, *Catholic Bishops*, *supra* note 27.

29. E.g., Laura Benshoff, *Catholic Church Lobbying Costs Spiked in Pa. as Statute of Limitations Debate Raged*, WHYY (June 8, 2019), <https://perma.cc/P7PP-U52K>. The Catholic Conference has also lobbied heavily against legislation that would eliminate state charitable immunity damage caps on civil claims. E.g., Krystal Knapp, *Catholic Church Fights for Shield*, BISHOPACCOUNTABILITY.ORG (Dec. 5, 2004), <https://perma.cc/4PPE-NSV5>.

30. *Reports of Attorneys General, Grand Juries, Individuals, Commissions, and Organizations*, BISHOPACCOUNTABILITY.ORG, <https://perma.cc/2WKH-LNPB> (last visited Aug. 15, 2022).

31. E.g., Office of the Attorney General, State of Illinois, *Preliminary Findings of the Investigation into Catholic Clergy Sexual Abuse of Minors in Illinois 5–7* (Dec. 19, 2018), <https://perma.cc/YU4S-548K> [hereinafter *Illinois AG Report*].

32. *Bankruptcy Protection in the Abuse Crisis*, BISHOPACCOUNTABILITY.ORG, <https://perma.cc/Q5G7-VGPR> (last visited Aug. 15, 2022).

33. John L. Allen, Jr., *Vatican Abuse Summit: \$2.2 Billion and 100,000 Victims in U.S. Alone*, NAT'L CATH. REP., Feb. 8, 2012.

34. E.g., *Illinois AG Report*, *supra* note 31, at 5–7; MISSOURI ATTORNEY GENERAL ERIC SCHMITT, *CATHOLIC CHURCH CLERGY ABUSE INVESTIGATION REPORT 006* (2019), <https://perma.cc/Z5QB-449S>.

35. Allen, *supra* note 33.

36. *Id.*

B. Boy Scouts of America

A decades-long coverup of child sexual abuse within the Boy Scouts of America (BSA) occurred concurrently with the efforts of bishops to conceal sexual abuse within the Catholic Church.³⁷ BSA officials insist that 90% of allegations involve incidents that occurred more than thirty years ago.³⁸ BSA files between 1959 to 1991 include 2,379 allegations of sexual abuse—an average of six complaints per month for thirty-two years.³⁹ A recent analysis of these files found that the BSA reported only 4% of those allegations to law enforcement.⁴⁰

The national governing body of the BSA maintained secret records of abuse allegations known within the organization as the “Perversion Files,” thousands of which it ultimately destroyed.⁴¹ Regional and local BSA administrators dealt with credible allegations by quietly dismissing abusers from the organization, citing reasons other than allegations of sexual abuse.⁴² They failed to thoroughly investigate and document allegations.⁴³ They conspired with law enforcement to avoid responses that might subject the organization to negative publicity.⁴⁴ In some cases, they actively concealed allegations.⁴⁵ They allowed some scoutmasters accused of abuse to continue working with boys while on “probation,” during which the scoutmasters victimized additional children.⁴⁶

37. Michelle Anne Cubellis, *Sexual Victimization, Disclosure, and Accountability: Organizational Responses of the Boy Scouts of America to Sexual Abuse 1* (Sept. 2015) (unpublished Ph.D. dissertation, CUNY), <https://perma.cc/LK9Q-EG9E>.

38. Emily R. Siegel, *Boy Scouts Reach \$850 Million Settlement with Tens of Thousands of Sexual Abuse Victims*, NBC NEWS (July 1, 2021), <https://perma.cc/L5R9-8HSX>.

39. Cubellis, *supra* note 37, at 71.

40. *Id.* at 71–72.

41. *Over 100 Years of Hidden Abuse*, ABUSED IN SCOUTING, <https://perma.cc/62MA-YMAG> (last visited Aug. 15, 2022); Paul Duggan, *Boy Scout ‘Perversion Files’ Released*, WASH. POST (Oct. 18, 2012), <https://perma.cc/ECT7-R9XU> (explaining that the files, formally called the “Ineligible Volunteer Files,” were “commonly known among Boy Scout officials as ‘the perversion files’”).

42. Kim Christensen & Jason Felch, *Boy Scouts Helped Alleged Molesters Cover Tracks, Files Show*, L.A. TIMES (Sept. 16, 2012), <https://perma.cc/M2HU-83BY>. See also PATRICK BOYLE, SCOUT’S HONOR: SEXUAL ABUSE IN AMERICA’S MOST TRUSTED INSTITUTION loc. 2170 (Kindle ed. 2013).

43. Cubellis, *supra* note 37, at 81.

44. Chris McGreal, *Sexual Abuse Scandal Rocks Boy Scouts of America after \$18.5m Payout*, GUARDIAN, Apr. 29, 2010.

45. Christensen & Felch *supra* note 42.

46. Corky Siemaszko, *Boy Scouts Bankruptcy Bid Prompts Other Sex Abuse Victims to Step Forward*, NBC NEWS (Feb. 18, 2020), <https://perma.cc/P355-FWFM>; Jason Felch & Kim Christensen, *A Paper Trail of Abuse*, L.A. TIMES, Aug. 5, 2012, at A1; Brian Knappenberger, *Exposing Boy Scouts Sex Abuse Turned into Battle of Press Freedom Against Powerful Interests*, INTERCEPT (Dec. 21, 2020), <https://perma.cc/X79V-FSQ4>.

BSA officials and local councils settled dozens of lawsuits in the 1970s and 1980s, paying out tens of millions of dollars in exchange for nondisclosure agreements.⁴⁷ Starting in the late 1980s, survivors started obtaining records from the BSA's Perversion Files through civil discovery.⁴⁸ Following a highly publicized 2010 jury verdict in Portland, Oregon, awarding a survivor \$1.4 million in actual damages and \$18.5 million in punitive damages, news organizations successfully petitioned the state court to release as public records 1,247 Perversion Files from the litigation.⁴⁹ Media outlets and survivors' groups posted these and other records obtained through litigation during the previous twenty years on the Internet.⁵⁰ According to an internal BSA review in 2019, the Perversion Files include allegations by 12,254 boys against 7,819 assailants between 1944 and 2016.⁵¹ Accounting for the fact that many survivors likely did not report their abuse, some experts believe that the number of incidents is much higher.⁵²

Like the bishops' conference, the BSA issued apologies and periodically announced new policies designed to prevent abuse, improve investigation of allegations, and assure prompt reporting.⁵³ At the same time, the BSA also lobbied against reforms to extend the statute of limitations on bringing child sex abuse claims.⁵⁴ And, taking another page out of the bishops' playbook, the BSA filed for bankruptcy in 2020 seeking a global settlement that would limit the number of claims and cap its liabilities.⁵⁵ At the time it filed for bankruptcy, the organization was facing 275 civil claims. The bankruptcy case prompted more than 82,000 additional survivors to file claims against the BSA for sexual abuse.⁵⁶

47. BOYLE, *supra* note 42, at loc. 3788; McGreal, *supra* note 44.

48. BOYLE, *supra* note 42, at loc. 4458.

49. *Id.* at loc. 4816.

50. *Id.* at loc. 4835.

51. Eliana Dockterman, *These Men Say the Boy Scouts' Sex Abuse Problem is Worse than Anyone Knew*, TIME, June 1, 2019.

52. *Id.*

53. BOYLE, *supra* note 42, at loc. 4835 (quoting BSA apologies for covering up abuse); Cubellis, *supra* note 37, at 206 (listing successive BSA policy reforms); *The Boy Scouts Youth Protection Timeline*, L.A. TIMES, <https://documents.latimes.com/boy-scouts-youth-protection-timeline/> (last visited Aug. 15, 2022). By contrast, some BSA defenders have portrayed the organization as under attack from a hostile press and a secular liberal political culture that cultivates tolerance for sexual mores that are inimical to scouting's traditional religious and moral principles. See, e.g., HANS ZEIGER, *GET OFF MY HONOR!: THE ASSAULT ON THE BOY SCOUTS OF AMERICA* (2005).

54. Dockterman *supra* note 51.

55. Mike Baker, *Boy Scouts Seek Bankruptcy to Survive a Deluge of Sex-Abuse Claims*, N.Y. TIMES, Feb. 18, 2020, at A17.

56. Randall Chase, *Future Liability Releases at Center of Boy Scouts Bankruptcy*, AP (Apr. 13, 2022), <https://perma.cc/56PR-9CVK>; Siemaszko, *supra* note 46; Kim Christensen, *Boy Scouts*

C. USA Gymnastics

Dr. Larry Nassar used his position as an athletic trainer for elite gymnastics programs to sexually abuse more than 500 girls and young women for two decades beginning in the mid-1990s.⁵⁷ In some cases, the abuse went on for years.⁵⁸ Executive officers and employees at the various organizations for which he worked—including USA Gymnastics, Michigan State University, and Twistars USA Gymnastics Club—ignored or actively suppressed complaints about him.⁵⁹

USA Gymnastics (USAG), the national governing body for the sport, maintained a secret file in the executive suite of its headquarters containing reports of sexually inappropriate behavior by coaches at USAG-affiliated clubs.⁶⁰ The organization failed to investigate or report allegations of sexual abuse.⁶¹ CEO Steve Penny urged survivors and their parents to remain quiet.⁶² He conspired with law enforcement to discredit press coverage of the organization's failure to act on complaints.⁶³ He steered official investigations in a direction favorable to the organization.⁶⁴ Eventually, he was indicted for destroying a suitcase full of Nassar's treatment records in the midst of a U.S. Olympic Committee investigation of the scandal.⁶⁵ To avoid negative publicity, the USAG allowed Nassar to concoct a cover story to explain his retirement from the organization, as he continued to see patients in his capacity as an athletic trainer at Michigan State University.⁶⁶

The first media account of Nassar's predations and the USAG coverup was published by the *Indianapolis Star* in September 2016.⁶⁷ A month prior to publication of the story, a team of investigative jour-

Reach Bankruptcy Deal with Attorneys for Sexual Abuse Survivors, L.A. TIMES (Feb. 10, 2022), <https://perma.cc/6UMF-KMMD>.

57. JOHN BARR & DAN MURPHY, *START BY BELIEVING: LARRY NASSAR'S CRIMES, THE INSTITUTIONS THAT ENABLED HIM, AND THE BRAVE WOMEN WHO STOPPED A MONSTER* 309 (2020); James Dator, *A Comprehensive Timeline of the Larry Nassar Case*, SBNATION (Sept. 15, 2021), <https://perma.cc/CC4K-L4D8>.

58. *E.g.*, BARR & MURPHY, *supra* note 57, at 88.

59. *Id.* at 105, 139, 164–68, 177, 181–87.

60. *Id.* at 186, 270.

61. *Id.* at 190–91, 194, 270–71.

62. *Id.* at 194; Heather Udowitch, *The Larry Nassar Nightmare: Athletic Organizational Failures to Address Sexual Assault Allegations and a Call for Corrective Action*, 16 DEPAUL J. SPORTS L. 93, 111 (2020).

63. BARR & MURPHY, *supra* note 57, at 191–92.

64. *Id.*; Udowitch, *supra* note 62, at 112.

65. BARR & MURPHY, *supra* note 57, at 256.

66. *Id.* at 198, 200. *See also* Udowitch, *supra* note 62, at 112.

67. Eric Levenson, *How the Indy Star and Rachael Denhollander Took Down Larry Nassar*, CNN (Jan. 25, 2018), <https://perma.cc/RPG2-53FP>.

nalists for the paper had published an exposé on USAG's failure to report sexual abuse allegations against its coaches.⁶⁸ The exposé was based on information obtained by two Georgia plaintiffs' attorneys through civil discovery in a case on behalf of a gymnast who was sexually abused by her USAG coach.⁶⁹ The attorneys had obtained fifty-four complaints against other gymnastics coaches, which the judge in the case sealed.⁷⁰ Publication of the exposé prompted a Nassar survivor to contact the journalists and share her story.⁷¹ As she recalled later: "I watched for a chance to be believed and I waited. And then the Indy Star story came out about rampant cover-up at USAG and I knew this was the chance and I wrote them immediately."⁷² The exposé also prompted plaintiffs' attorney John Manly, who was preparing to file a civil claim against USAG on behalf of another Nassar survivor, to contact the journalists and provide additional information.⁷³ The journalists waited until Manly's lawsuit was filed and entered into the public record, and then they published their story on the Nassar scandal.⁷⁴

In the wake of the *Indianapolis Star* article, additional victims came forward.⁷⁵ They shared information with journalists, filed civil lawsuits, and gave statements to investigators.⁷⁶ The Senate Commerce Subcommittee on Manufacturing, Trade, and Consumer Protection launched an investigation of the scandal and issued a scathing report detailing efforts by the USAG and the U.S. Olympic Committee to coverup Nassar's misdeeds.⁷⁷ The Michigan Attorney General launched a similar investigation of Michigan State University's coverup.⁷⁸ Nassar pled guilty to state and federal criminal charges.⁷⁹

68. Marisa Kwiatkowski et al., *A Blind Eye to Sex Abuse: How USA Gymnastics Failed to Report Cases*, *INDY STAR* (June 24, 2020), <https://perma.cc/XRX8-8N52> (originally titled *Out of Balance: How USA Gymnastics Protected Coaches over Kids*), discussed in Levenson, *supra* note 67, and BARR & MURPHY, *supra* note 57, at 215.

69. Caroline Rothstein, *Lawsuits, Leads and Old-Fashioned Legwork Helped Expose Larry Nassar*, *ABA J.* (June 1, 2018), <https://perma.cc/7VD9-529M>; Kwiatkowski et al., *supra* note 68.

70. Rothstein, *supra* note 69.

71. *Id.*; BARR & MURPHY, *supra* note 57, at 215–16.

72. Levenson, *supra* note 67.

73. BARR & MURPHY, *supra* note 57, at 216.

74. *Id.* at 221.

75. *Id.* at 225.

76. *Id.* at 232.

77. Sarah Fitzpatrick et al., *Congress: U.S. Olympic Committee, FBI Failed to Protect Athletes from Larry Nassar's Abuse*, *NBC NEWS* (July 30, 2019), <https://perma.cc/B8MP-G5CQ>.

78. Taylor Romine, *Michigan Attorney General Closes Investigation into Larry Nassar's Abuses after Saying University was Unhelpful*, *CNN* (Mar. 26, 2021), <https://perma.cc/LN72-F8EU>.

79. BARR & MURPHY, *supra* note 57, at 277, 283.

More than 150 survivors shared nationally televised victim impact statements in open court at his state sentencing hearing.⁸⁰ Criminal charges were also brought against USAG officials.⁸¹ They offered public apologies and have announced institutional reforms.⁸² Facing more than 450 civil lawsuits, USAG filed for bankruptcy in an effort to halt further discovery, limit claims, and cap its liability.⁸³

D. Abuse and Betrayal

In each of these three examples, fear of public scandal motivated institutional leaders to conceal information about conduct that they recognized as both immoral and illegal. This fear led them to abandon their responsibilities to protect children entrusted to their care from individuals under their supervision. They failed to report credible allegations of child sexual abuse to civil authorities. They intimidated survivors who complained. They actively interfered with law enforcement investigations. They allowed alleged abusers to remain in positions where the abusers continued to prey on children. They attempted to suppress media coverage. They offered apologies to victims and made promises of reform while continuing to conceal information.

In allowing abusers to remain in positions where they continued to violate children, these institutional leaders are responsible for perpetuating the abuse.⁸⁴ Additionally, for many survivors, betrayal by institutional leaders on whom they justifiably relied for help intensified the trauma of sexual abuse.⁸⁵ It exacerbated survivors' sense of isolation and their mistrust of others.⁸⁶ It undermined their attachment to the values proclaimed by these institutional leaders—values such as religious faith, moral community, and fair play that, under other cir-

80. Ashley May, *Here's What Happened Each Day of Larry Nassar's Hearing*, 9NEWS (Jan. 30, 2018), <https://perma.cc/QQR3-FCYM>.

81. BARR & MURPHY, *supra* note 57, at 310–11.

82. Rachel Axon, *USA Gymnastics CEO Apologizes, Outlines Changes Made to Address Nassar Abuse Scandal*, USA TODAY (May 22, 2018), <https://perma.cc/HFU8-74X4>.

83. Alex Wolf, *USA Gymnastics' \$380 Million Bankruptcy Plan Gets Approval*, BL (Dec. 13, 2021), <https://perma.cc/MN3W-BE3F>; Marci A. Hamilton & Bridget Brainard, *Rethinking Chapter 11 for Mass Child Sexual Abuse Claims: Shifting the Focus from Debtor Institutions to the Victims*, 30 J. BANKR. L. & PRAC. 1 (2021).

84. Calvin Nite & John Nauright, *Examining Institutional Work that Perpetuates Abuse in Sport Organizations*, 23 SPORT MGMT. REV. 117, 125 (2020), <https://doi.org/10.1016/j.smr.2019.06.002>.

85. Ashley Wellman et al., *Routine Activities Theory as a Formula for Systematic Sexual Abuse: A Content Analysis of Survivors' Testimony against Larry Nassar*, 46 AM. J. CRIM. JUST. 317, 334–36 (2020).

86. *Core Issues of Abuse: Betrayal*, INTO THE LIGHT, <https://perma.cc/ERD6-TWBB> (last visited Aug. 15, 2022) (discussing isolation and lack of trust as consequences of institutional failure to protect victims from sexual abuse).

cumstances, would have been a source of strength in healing from trauma.⁸⁷

Survivors ultimately turned to the civil justice system in the hope of holding these institutional leaders publicly accountable.⁸⁸ In the next section, I examine what accountability means in this context and how civil litigation achieves it. I also analyze internal tensions between the various forms of accountability that civil litigation offers.

However, before turning to those issues, it is worth noting that the three sexual abuse scandals presented in this section do not merely share common features. They are intertwined. To begin with, there is overlap among the institutions that covered up and perpetuated the abuse. For example, more than 70% of scouting units are owned and operated by faith-based organizations under charter from the BSA.⁸⁹ As of 2013, Catholic Church organizations operated more than 8,000 scouting units involving more than 250,000 scouts under the direction of the National Catholic Committee on Scouting (NCCS).⁹⁰ The NCCS's mission is to "use [] the program of the BSA as a viable form of youth ministry."⁹¹ It is "advisory to the Boy Scouts of America" and "seeks to sustain and strengthen the relationship between BSA and the Catholic Church in the United States."⁹² The NCCS derives its authority from the U.S. Conference of Catholic Bishops, in which it is represented by an Episcopal Liaison.⁹³ Catholic bishops and other church officials have been implicated in the BSA sexual abuse scandal. Many BSA abuse allegations came from boys in scouting units sponsored by Catholic entities, and, in some cases, the allegations were against priests.⁹⁴ In the BSA bankruptcy, a committee representing ten Catholic dioceses and archdioceses held out for settlement terms that released every Catholic entity nationwide from liability for scouting-related abuses.⁹⁵

87. See generally Thema Bryant-Davis & Eunice C. Wong, *Faith to Move Mountains: Religious Coping, Spirituality, and Interpersonal Trauma Recovery*, 68 AM. PSYCH. 675 (2013) (describing the role of religious faith and faith communities in trauma recovery); Grant Hilary Brenner, *7 Ways Trauma Shapes Morality*, PSYCH. TODAY (Dec. 16, 2020), <https://perma.cc/C29G-8X48> (discussing the damage to personal morality caused by trauma).

88. See *infra* Part II.

89. *Fact Sheet, Chartered Organizations and the Boy Scouts of America*, BOY SCOUTS AM. (March 2014), <https://perma.cc/W6DW-BYRM>.

90. *Id.*

91. *What is the National Catholic Committee on Scouting?*, NAT'L CATH. COMM. ON SCOUTING (2022), <https://perma.cc/W8YA-4U2Y>.

92. *Id.*

93. *Id.*

94. Lyle Adriano, *Boy Scouts of America Reaches Settlement Deal with Catholic Committee*, INS. BUS. AM. (Mar. 21, 2022), <https://perma.cc/4ZUH-W4H7>.

95. *Id.*

Additionally, there is overlap among the lawyers involved. Plaintiffs' attorneys who represented survivors in civil claims against the BSA and USAG were well-known veterans of lawsuits against Catholic bishops. Kelly Clark, who won the landmark 2010 lawsuit against the BSA that led to the public disclosure of the organization's Perversion Files and ultimately unleashed 82,000 additional claims, had earlier secured a 1999 landmark court victory against the Archdiocese of Portland in which the Oregon Supreme Court held that the diocese could be held vicariously liable for sexual abuse committed by priests it employed.⁹⁶ John Manly litigated more than one thousand cases against Catholic Church officials on behalf of sexual abuse survivors, including a \$660 million global settlement of 508 claims against the Archdiocese of Los Angeles, before filing the first lawsuit against USAG in the Nassar scandal and representing the Nassar victims in lawsuits against Michigan State University and the USAG.⁹⁷ He secured a \$500 million global settlement in the case against Michigan State and a \$380 million global settlement against USAG.⁹⁸ Manly has also been a leading figure in litigation against the BSA.⁹⁹ There is also overlap among defense counsel and liability insurers involved in the three scandals.¹⁰⁰

II. TORT CLAIMS AS A RESPONSE TO CORPORATE MISCONDUCT

Survivors of child sexual abuse frequently explain that they filed lawsuits to hold institutional leaders accountable for their misconduct.¹⁰¹ When survivors articulate what this means, they refer to a variety of outcomes. Frequently, they relate that they want their "day in court" to tell their stories and publicly confront the institutional leaders who betrayed them.¹⁰² Survivors also sue to obtain financial compensation for the physical and emotional harms they have suffered

96. Randall Chase, *Scouts Reach Deal with Catholic Committee in BSA Bankruptcy*, AP (Mar. 18, 2022), <https://perma.cc/23WJ-L42S>.

97. John C. Manly, MANLY, STEWART & FINALDI, <https://perma.cc/7657-G6Q7> (last visited Aug. 15, 2022); Scott M. Reid, *USA Gymnastics Proposes Settlement in Nassar Suits*, ORANGE CNTY. REG. (Jan. 30, 2020), <https://perma.cc/W6LD-H8HV>.

98. Mary Louise Kelly et al., *USA Gymnastics Settles with Nassar Abuse Victims*, NPR (Dec. 13, 2021), <https://perma.cc/RV7K-GJ6V>.

99. Mike Baker, *At Stake in Boy Scouts' Bankruptcy: \$1 Billion in Assets, or Much More*, N.Y. TIMES (May 11, 2021), <https://perma.cc/C84D-SRJX>.

100. E.g., James I. Stang, PACHULSKI STANG ZIEHL & JONES, <https://perma.cc/S54D-JZ5Y> (last visited Aug. 15, 2022); Chase, *supra* note 96.

101. E.g., Janet Oravetz & Courtney Yuen, *Former Episcopal Priest Sexually Abused Teen, Lawsuit Says*, 9NEWS (July 22, 2022), <https://perma.cc/E6TY-MUSS> (quoting survivor explaining that "I filed this lawsuit because the Diocese needs to be held accountable for what happened to me . . .").

102. See *infra* Part II.A.

from the abuse and the coverup.¹⁰³ Additionally, survivors typically want to make sure that what happened to them will not happen to others in the future.¹⁰⁴ And survivors often express a desire to see corporate wrongdoers punished for their misconduct.¹⁰⁵

In this Part, I analyze what it means to hold institutional leaders accountable in terms of four distinct but related conceptions, and I explain how tort litigation advances each one of them.¹⁰⁶ I refer to the four conceptions of accountability as storytelling, liability, institutional reform, and criminal prosecution.

A. *Storytelling: The Expressive Function of Tort Litigation*

One conception of accountability refers to giving a narrative account. Under this conception, making a person accountable for wrongdoing means telling a story that describes and explains their misconduct, or compelling them to tell such a story.¹⁰⁷ Tort litigation facilitates this type of storytelling in several ways.

First, tort litigation has been instrumental in breaking the silence imposed by institutionalized coverups of child sexual abuse. Media outlets are reticent to publish allegations of sexual abuse unless they are part of some sort of legal proceeding or are otherwise officially documented.¹⁰⁸ Legal sources lend allegations credibility and furnish a factual basis to defend against a libel suit or provide political cover for a news organization.¹⁰⁹ In the face of institutional coverup, the only legal proceeding available to survivors or way to officially document their experience is filing a tort claim. Plaintiffs' attorneys are often the first individuals to validate survivors' allegations, and they give survivors access to media coverage.¹¹⁰

103. See *infra* Part II.B.

104. See *infra* Part II.C.

105. See *infra* Part II.D.

106. The discussion that follows presents four conceptions of the concept of accountability. For an explanation of the distinction between concepts and conceptions, see *Legal Theory Lexicon 028: Concepts and Conceptions*, LEGAL THEORY LEXICON (Mar. 21, 2004), <https://perma.cc/QNX7-CNVE>.

107. See generally Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1 (2017) (analyzing the expressive function of tort law). See also Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67 (2010).

108. E.g., LYTTON, *supra* note 2, at 94–95 (discussing newspaper editors' insistence that reporting on child sexual abuse by Catholic priests be based on legal sources).

109. *Id.*

110. E.g., *id.* at 177 (reporting findings from a survey of clergy sexual abuse survivors who stated that their initial interviews with plaintiffs' attorneys were the first time that anyone believed their allegations); BARR & MURPHY, *supra* note 57, at 2 (describing the first meeting of a survivor of abuse by Larry Nassar with plaintiffs' attorney John Manly at which he validated her allegations).

Initial news articles about misconduct by bishops, BSA leaders, and USAG officials all relied on information obtained from litigation documents. Media coverage that broke the story of Catholic Church officials' coverup of clergy sexual abuse occurred in 1984 based on civil filings in the Gilbert Gauthé case.¹¹¹ Initial media coverage of the BSA scandal in 1988 relied on the first set of Perversion Files records obtained in litigation, and the scandal first received national and sustained attention when news organizations successfully sued for public disclosure of a much larger set of Perversion Files records obtained through discovery in the landmark 2010 lawsuit against the BSA in Portland, Oregon.¹¹² The *Indianapolis Star* based its initial article about USAG's coverup of sexual abuse by coaches on litigation files,¹¹³ and the newspaper waited to publish its first article on the Larry Nassar scandal until after Manly's initial complaint was filed as a public court document.¹¹⁴

Even after initial stories, litigation records continue to provide credible sources on which continuing media coverage relies. The drama, episodic nature, and duration of litigation sustain ongoing media attention. In journalistic terms, litigation events provide "hooks" for a story, and the steady supply of such events gives the story "legs."¹¹⁵ Leading popular books on the Catholic Church, BSA, and USAG scandals are all authored by journalists, and all contain extensive notes indicating that litigation files provided the primary source for their accounts.¹¹⁶

Second, tort litigation gives survivors an opportunity to tell their stories and have them validated. Plaintiffs' attorneys file lawsuits when they can establish the doctrinal requirements of wrongdoing, causation, and damages in claims against wealthy institutional defendants capable of paying sizeable settlements or judgments.¹¹⁷ Consequently, tort claims highlight egregious misconduct by powerful

111. LYTTON, *supra* note 2, at 1–3.

112. BOYLE, *supra* note 42, at loc. 4634–878. *See also* Knappenberger, *supra* note 46.

113. Rothstein, *supra* note 69.

114. BARR & MURPHY, *supra* note 57, at 221.

115. LYTTON, *supra* note 2, at 84–86, 98–101 (analyzing how litigation attracts ongoing media coverage).

116. *Id.* at 96–97; BARR & MURPHY, *supra* note 57, at 318; BOYLE, *supra* note 42, at loc. 72–89, 4853.

117. Timothy D. Lytton, *Rules and Relationships: The Varieties of Wrongdoing in Tort Law*, 28 SETON HALL L. REV. 359 (1997) (arguing that all tort claims include allegations of wrongdoing, causation, and damages); JAMES A. HENDERSON, JR. & DOUGLAS A. KYSAR, *THE TORTS PROCESS* 4 (10th ed. 2022) (explaining that filing a tort claim typically requires identification of a defendant capable of paying a sizeable settlement or judgment).

institutions that cause significant injury.¹¹⁸ Tort claims frame litigation in terms of the survivor's perspective.¹¹⁹ This framing makes survivors' stories attractive to media outlets by providing morally compelling narratives involving the abuse of power by well-known institutional leaders who inflict great harm on innocent victims.¹²⁰ Tort litigation thus gives voice to survivors in ways that enhance their ability to obtain vindication from judges and juries in the courtroom and access to media audiences in the court of public opinion.

The framing of institutional coverup articulated in tort claims has dominated media coverage and, consequently, public perceptions of child sexual abuse scandals in the Catholic Church, the BSA, and USAG. Bishops have cast themselves as victims of abusive priests who concealed their crimes from diocesan officials.¹²¹ They have blamed the scandal on popular culture for cultivating sexual attitudes that have eroded priests' commitment to celibacy.¹²² They have accused the media of anti-Catholic bias.¹²³ They have attempted to divert attention away from the coverup by emphasizing that allegations typically involve incidents of abuse that occurred decades earlier.¹²⁴ They have lashed out against tolerance of homosexuality within the Church and in society more generally.¹²⁵ In the early years of the scandal, they even tried to minimize the scandal by drawing a distinction between sexual molestation of prepubescent children (pedophilia) and postpubescent adolescent children (ephebophilia), noting that in-

118. *E.g.*, Timothy D. Lytton, *Introduction: An Overview of Lawsuits Against the Gun Industry*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL & MASS TORTS* 1–15 (Timothy D. Lytton, ed., 2006) (gun manufacturers); Engstrom & Rabin, *supra* note 4, at 285, 300–05, 310–13, 355–57 (2021) (tobacco and opioid manufacturers).

119. *See* Hershovitz, *Treating Wrongs*, *supra* note 107, at 45, 63 (discussing the expressive function of tort liability).

120. *See* LYTTON, *supra* note 2, at 85–86 (comparing the framing of tort claims with journalistic criteria of newsworthiness).

121. *Id.* at 102.

122. *Id.* at 103. *See also* Lytton, *Catholic Bishops Still Don't Get It*, *supra* note 27 (quoting Albany, New York, bishop Edward Sharfenberger's comments attributing the Catholic Church's clergy sexual abuse scandal on "contemporary culture" that "now holds it normative that sex and sexual gratification between any consenting persons for any reason that their free wills allow is perfectly acceptable" and calling for a "culture of chastity").

123. LYTTON, *supra* note 2, at 103.

124. Lytton, *Catholic Bishops Still Don't Get It*, *supra* note 27 (quoting Chicago archbishop Cardinal Blase Cupich's statement in response to the Illinois Attorney General's report detailing diocesan coverup of sexual abuse allegations that "the vast majority of abuses took place decades ago"); Thomas G. Plante, *Myths About Clergy Abuse*, ARCHDIOCESE OF OKLA. CITY (2019), <https://perma.cc/GT5V-3GBY> ("The relentless press attention gives the impression that sexual abuse is still commonplace in the Catholic Church, even though the vast majority of cases of clerical abuse occurred before the mid-1980s.").

125. LYTTON, *supra* note 2, at 104–05.

stances of the former were relatively rare among reported cases of clergy sexual abuse while the latter were more common.¹²⁶ Notwithstanding these attempts, media coverage has predominantly framed the central issue in the scandal as the ongoing coverup by Church officials of child sexual abuse by priests and others under their supervision.¹²⁷ A similar pattern is evident in media coverage of both the BSA and USAG scandals.¹²⁸

Third, tort litigation calls powerful institutional leaders to account for their misconduct. Complaints, discovery, depositions, and trials all require institutional leaders to respond to survivors' allegations, either through their attorneys or directly in writing or in person. For survivors betrayed by institutional leaders through denial, intimidation, harassment, and secrecy, civil litigation provides otherwise unobtainable opportunities for survivors to force those leaders to answer for their actions. Civil litigation compelled powerful prelates like Cardinal Bernard Law of Boston and BSA Executive Douglas Smith to answer questions in recorded video depositions.¹²⁹ Litigation compelled dioceses, the BSA, and USAG to divulge the contents of their secret files.¹³⁰

The expressive function of tort law—breaking silence, giving voice to survivors' stories, and compelling institutional leaders to answer for their actions—has a cascading effect fueled by feedback effects between litigation and media coverage. Plaintiffs' attorneys want media coverage to serve their clients, build their reputations, and attract business. Media organizations want newsworthy stories based on legal sources. Litigation generates news stories, and news stories generate litigation. For example, after filing the initial suits against USAG, what one journalist described as “the well-oiled media arm of John Manly's law firm” arranged press interviews for clients.¹³¹ Subsequent

126. *Id.* at 105.

127. *Id.* at 106–07.

128. *E.g.*, Christensen & Felch, *supra* note 46 (focus on institutional coverup by BSA officials); Kwiatkowski et al., *supra* note 68 (focusing on institutional coverup by USAG officials).

129. *Deposition of Cardinal Bernard Law*, BOS. GLOBE DOCUMENTS, ABUSE IN THE CATH. CHURCH (May 8, 2002), <https://perma.cc/P3NR-TJKT>; *Boy Scouts of America Sex Abuse Trial Deposition Excerpts*, YAHOO!NEWS (Jan. 3, 2013), <https://perma.cc/DK5G-4TY7>.

130. *Newly Released Files Shed Light on Decades of LA abuse in Catholic Archdiocese*, FOXNEWS (Jan. 13, 2015), <https://perma.cc/UF72-J8X6>; Kirk Johnson, *Oregon Justices Approve Release of Boy Scouts' 'Perversion Files'*, N.Y. TIMES (June 14, 2012), <https://perma.cc/7V55-CQLR>; Mark Alesia et al., *Georgia Judge to Unseal USA Gymnastics Sex Abuse Records*, INDY STAR (Aug. 29, 2016), <https://perma.cc/DW3Y-H4EC>. *See also* BARR & MURPHY, *supra* note 57, at 274 (describing how USA Gymnastics officials disclosed in depositions the organization's longstanding practice of not reporting sexual assault complaints).

131. BARR & MURPHY, *supra* note 57, at 274–75.

media coverage of the litigation eventually emboldened more than 500 additional survivors to come forward and file claims, which in turn have generated ongoing media coverage.¹³²

B. Liability: The Compensatory Function of Tort Litigation

A second conception of accountability refers to financial accounting. Under this conception, to make a person accountable for wrongdoing is to make them bear the resulting financial costs. Tort litigation facilitates this type of financial accountability through judgments of liability and negotiated settlements.

Corporate defendants have paid out considerable sums for covering up child sexual abuse. Catholic Church entities in the U.S. and their insurers have paid out more than \$3.2 billion to more than 8,600 survivors in judgments and settlements since 1984.¹³³ The BSA, local scouting organizations, their insurers, and survivors settled 82,000 claims for \$2.3 billion in bankruptcy proceedings.¹³⁴ The USAG, its insurers, and the U.S. Olympic and Paralympic Committee entered into a \$380 million settlement with more than 500 survivors of abuse by Larry Nassar.¹³⁵

The relationship between the compensatory and expressive functions of tort law has shifted over time. As is the case generally for civil claims, most lawsuits involving the coverup of child sexual abuse are resolved through negotiated settlements.¹³⁶ Prior to the late 1990s, settlements in clergy sexual abuse lawsuits typically included nondisclosure agreements that prevented survivors from discussing their al-

132. Tim Evans, *Fallout from Nassar Case Prompts Experts to Call for New Leadership of US Olympic Programs*, *INDY STAR* (Jan. 28, 2022), <https://perma.cc/L4RP-FP7Z>.

133. *Sexual Abuse by U.S. Catholic Clergy: Settlements and Monetary Awards in Civil Suits*, *BISHOPACCOUNTABILITY.ORG*, <https://perma.cc/8V47-XRHV> (last visited Aug. 16, 2022). Compare Emily Zogbi, *The Catholic Church has Paid Nearly \$4 Billion Over Sexual Abuse Claims, Group Says*, *NEWSWEEK* (Aug. 25, 2018), <https://perma.cc/38V4-99TP> (estimating \$4 Billion in total payouts).

134. Dietrich Knauth, *Boy Scouts Nears Court Approval of \$2.3 Billion Bankruptcy Settlement*, *REUTERS* (Sept. 1, 2022), <https://perma.cc/D3DT-8GPC>.

135. Anna Kaplan, *USA Gymnastics, U.S. Olympic Committee Agree to \$380 Million Settlement with Nassar Victims*, *FORBES* (Dec. 13, 2021), <https://perma.cc/CU5X-ZBRN>; Juliet Macur, *Nassar Abuse Survivors Reach \$380 Million Settlement*, *N.Y. TIMES* (Dec. 13, 2021), <https://perma.cc/UWP9-59F5>.

136. HENDERSON & KYSAR, *supra* note 117, at 9 (“very few torts disputes are resolved by the satisfaction of a judgment obtained in a court action”); *Sexual Abuse Civil Lawsuits that Have Gone to Trial*, *BISHOPACCOUNTABILITY.ORG* (Dec. 6, 2010), <https://perma.cc/A989-A2HL> (listing forty-three civil suits against Catholic entities for clergy sexual abuse that have been tried out of thousands that have been filed).

legations of abuse and official coverup.¹³⁷ Thus, the desire to make dioceses financially accountable for misconduct motivated many clergy sexual abuse survivors to sacrifice their opportunity to break the silence, share their stories, and force Church officials to publicly account for their actions.¹³⁸ Claimants against the BSA prior to 2010 and early claimants against USAG made similar tradeoffs by accepting settlements with nondisclosure agreements.¹³⁹

However, not all survivors accepted financial settlements conditioned on nondisclosure agreements, and some of them achieved court victories that set the groundwork for later settlements that facilitated public disclosure.¹⁴⁰ These court victories shifted the balance of bargaining power in favor of subsequent plaintiffs and empowered them to secure settlements without having to accept nondisclosure as a condition of payment. In some cases, settlements even included publication of defendants' records documenting allegations of abuse and detailing their efforts to cover them up.¹⁴¹ Court victories shifted the balance of bargaining power, first, by improving plaintiffs' chances of conducting civil discovery and thereby potentially obtaining sizeable jury verdicts and, second, by dramatically increasing the number of claims and, hence, the liability exposure of defendants.¹⁴²

For example, in 1997, survivors in Dallas, Texas, obtained a \$119.6 million jury verdict against the bishop and diocesan officials for ignoring complaints and warnings regarding the sexual abuse of dozens of children by Father Rudy Kos during his assignments to three Dallas-area parishes between 1981 and 1992.¹⁴³ The courtroom drama and the unprecedented size of the jury verdict generated sustained national media coverage that shifted public opinion and judicial attitudes.¹⁴⁴ Public sympathy for the plight of survivors and ire at the

137. LYTTON, *supra* note 2, at 146. *See also id.* at 27, 152–54 (discussing the increasing rejection of nondisclosure agreements by plaintiffs starting in 1997); Barbara Bradley, *Catholic Church*, NPR (Mar. 21, 2002), <https://perma.cc/E2NV-2DRV> (noting the trend away from nondisclosure agreements in 2002).

138. LYTTON, *supra* note 2, at 152–54.

139. BOYLE, *supra* note 42, at loc. 3787; BARR & MURPHY, *supra* note 57, at 275.

140. *Sexual Abuse Civil Lawsuits that Have Gone to Trial*, *supra* note 136; LYTTON, *supra* note 2, at 152–54.

141. *E.g.*, *Newly Released Files*, *supra* note 130 (release of personnel files containing evidence of Catholic officials' efforts to cover up allegations of clergy sexual abuse in the LA archdiocese); Johnson, *supra* note 130 (publication of the BSA's "perversion files").

142. *See infra* notes 143–146 and accompanying text discussing the impact of the Kos trial on subsequent clergy sexual abuse litigation.

143. LYTTON, *supra* note 2, at 27–28. Although the case ultimately settled for \$31 million after the diocese threatened to file for bankruptcy, the verdict marked a turning point in the course of clergy sexual abuse litigation. *Id.* at 29–30.

144. *Id.*

misconduct of Church officials encouraged more survivors to come forward and file claims.¹⁴⁵ Judges became more open to plaintiffs' efforts to uncover episcopal misconduct through broad discovery, and they became more skeptical of defendants' assertions that the First Amendment guaranteed them sweeping immunity from such probes.¹⁴⁶

Armed with increasing numbers of clients and emboldened by a higher likelihood of conducting civil discovery and obtaining favorable jury verdicts, plaintiffs' attorneys were able to secure financial settlements for their clients without acceding to nondisclosure agreements. With the dramatic increase in the number of clergy sexual abuse claims starting in the 2000s,¹⁴⁷ large aggregate settlements became the norm, and more than a dozen of them have included terms that require defendants to publicly disclose information about abuse allegations and efforts to cover them up.¹⁴⁸ For example, the Los Angeles archdiocese paid \$660 million to settle 508 claims in 2007 and, as part of the settlement, agreed to release personnel files documenting unreported allegations of abuse by twenty-five priests.¹⁴⁹

Settlements in lawsuits against the BSA and USAG have followed a similar pattern. The \$18.5 million jury verdict against the BSA in 2010 by a Portland, Oregon, jury had a similar galvanizing effect and put an end to the use of nondisclosure agreements in settlements.¹⁵⁰ So too did John Manly's filing of the first civil claim based on sexual abuse by Larry Nassar against USAG in 2016.¹⁵¹

Although the dramatic increase in the volume of claims and the advent of aggregation have ended nondisclosure agreements as a condition of obtaining compensation, they have raised new tensions between the compensatory and expressive functions of tort litigation. Defendants facing a large volume of claims have increasingly resorted to bankruptcy to achieve a global settlement of pending and future claims that will cap their liability.¹⁵² Twenty-six dioceses and three re-

145. *Id.* at 51 (noting a dramatic rise in new cases in 2000 and 2001 following the Kos verdict in 1997).

146. *Id.* at 29.

147. *Id.* at 49–54.

148. *Sexual Abuse by U.S. Catholic Clergy: Settlements*, *supra* note 133.

149. *Id.*

150. BOYLE, *supra* note 42, at loc. 4797–853 (also noting the influence of lawsuits against Catholic entities for clergy sexual abuse on litigation against BSA for sexual abuse by scoutmasters).

151. BARR & MURPHY, *supra* note 57, at 232.

152. Lindsey D. Simon, *Bankruptcy Grifters*, 131 *YALE L. J.* 1154, 1161–66 (2022).

ligious orders have filed for bankruptcy protection since 2004.¹⁵³ USAG filed for bankruptcy protection in 2018, and the BSA did so in 2020.¹⁵⁴

Defenders of bankruptcy as a means of resolving mass tort litigation argue that it facilitates equitable distribution among plaintiffs of a defendant's assets and liability insurance coverage.¹⁵⁵ Tort litigation can create disparities between plaintiffs who suffer similar injuries, and the eventual depletion of a defendant's assets and insurance coverage can leave later claimants entirely uncompensated.¹⁵⁶ Under bankruptcy plans, defendants provide compensation to all claimants based on the severity of injury regardless of the order in which they initiated their claims.¹⁵⁷ Moreover, bankruptcy plans can include contributions from non-debtor third-parties to increase the size of compensation funds.¹⁵⁸ For example, the proposed \$2.3 billion BSA bankruptcy compensation fund includes contributions by sponsors of local troops, such as churches and civil groups, in exchange for releasing them from liability.¹⁵⁹

Skeptics have argued that bankruptcy shortchanges tort plaintiffs and that defendants have abused the process to hide their assets.¹⁶⁰ Bankruptcy may make fewer of a defendant's assets available to tort plaintiffs than tort litigation, since bankruptcy prioritizes other creditors above tort plaintiffs.¹⁶¹ Moreover, bankruptcy proceedings involving the diocese of San Diego in 2007 and the archdiocese St. Paul and Minneapolis in 2015 included disputes over whether Church officials improperly concealed assets from the court.¹⁶²

Aside from its implications for monetary compensation, the growing trend among institutional defendants in child sexual abuse litiga-

153. *Bankruptcy Protection in the Abuse Crisis*, BISHOPACCOUNTABILITY.ORG, <https://perma.cc/76Y3-AHFJ> (last visited Aug. 17, 2022).

154. Rebecca Davis O'Brien & Katy Stech Ferek, *USA Gymnastics Files for Bankruptcy*, WALL ST. J. (Dec. 5, 2018), <https://perma.cc/TR26-CXJJ>; Baker, *supra* note 99.

155. Comment, *Relief from Tort Liability through Reorganization*, 131 U. PA. L. REV. 1227 (1983).

156. *Id.* at 1240–45.

157. Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1639–40 (2008).

158. John J. Rapisardi & Jacob T. Beiswenger, *Navigating Views on Third-Party Releases in Restructuring Plans*, 267 N.Y. LAW J. 1, 2 (2022) (explaining that “non-debtors with liability exposure may be willing to provide substantial financial contributions”).

159. Hamilton & Brainard, *supra* note 83, at 6. *But see* Knauth, *supra* note 134 (discussing judicial disapproval of some provisions of the BSA bankruptcy plan that would have shielded non-debtor parties from liability).

160. Hamilton & Brainard, *supra* note 83, at 10.

161. *Id.* at 2.

162. *Id.* at 11.

tion of filing for bankruptcy undermines the expressive function of tort litigation. Filing a bankruptcy petition institutes an automatic stay of pending civil actions against the debtor, which halts discovery and deprives survivors of their right to a jury trial.¹⁶³ Bankruptcy plans that release non-debtor third parties from liability shield them also from having to disclose information about their role in facilitating or covering up abuse.¹⁶⁴ Although bankruptcy does allow survivors as creditors to issue subpoenas for information related to potential liability related to a bankruptcy proceeding, in practice, the scope of such inquiries is more restrictive in bankruptcy than in tort litigation.¹⁶⁵

In theory, there is nothing in bankruptcy law that would prohibit settlements requiring debtors to release secret records detailing abuse allegations and efforts to cover them up. However, bankruptcy courts have the power to impose settlements over the objections of tort claimants if the judge considers the plan fair and equitable. This aspect of bankruptcy law—known as the “cramdown” provision—deprives survivors of leverage to obtain such disclosures.¹⁶⁶ Consequently, some dioceses have used bankruptcy to avoid disclosing internal files, although, in practice, this has not proven to be a successful tactic.¹⁶⁷

C. *Institutional Reform: The Deterrent Function of Tort Litigation*

A third conception of accountability refers to taking responsibility for fixing a problem. Under this conception, making a person accountable for wrongdoing entails imposing a duty on them to prevent its recurrence. Tort litigation establishes doctrines that impose duties of

163. *Id.* at 2. See also Juan Martinez, *Sexual Abuse and Bankruptcy: How Organizations Abuse Chapter 11 to Avoid Victims’ Demands for Answers*, 37 EMORY BANKR. DEVS. J. 213 (2020); Marci A. Hamilton et al., *Roman Catholic Dioceses in Bankruptcy: An Exploratory Study of Victims’ Experiences*, 30 J. BANKR. L. & PRAC. NL ART. 2 (2021).

164. Hamilton & Brainard, *supra* note 83, at 5.

165. *E.g.*, *id.* at 10. See Simon, *supra* note 152, at 1159.

166. *Relief from Tort Liability through Reorganization*, *supra* note 155, at 1234.

167. Steve Orr, *Rochester Diocese: Secret Clergy Sex Abuse Files Could Come Out During Bankruptcy*, DEMOCRAT & CHRONICLE (Dec. 23, 2019), <https://perma.cc/NKH2-TF7L> (explaining that “[s]ome Catholic dioceses have indeed used Chapter 11 bankruptcy to avoid disclosing internal files and revealing information about clerical misconduct and potential cover-ups,” but noting the release of such files in bankruptcies of dioceses in Santa Fe, Minneapolis-St. Paul, Milwaukee, and Duluth). Compare Ivey DeJesus, *Bankruptcy Court Could Force Catholic Diocese of Harrisburg to Disclose Secret Archives of Clergy Sex Abuse*, PENNLIVE (Feb. 21, 2020), <https://perma.cc/3EKN-34TY> (noting that the “list of dioceses and archdioceses that have been court ordered to make public their confidential files in a bankruptcy proceedings continues to grow” and includes Portland, Oregon; Davenport, Iowa; San Diego; Wilmington, Delaware; and Gallup, New Mexico).

care to prevent future harm, and liability exposure provides economic and reputational incentives to fulfill such duties.¹⁶⁸

Tort litigation for the coverup of child sexual abuse has prompted extensive institutional reforms. In response to lawsuits, the U.S. Conference of Catholic Bishops (USCCB) adopted in 2002 the Charter for the Protection of Children and Young People, a set of mandatory guidelines requiring all dioceses to investigate and report allegations of child sexual abuse, discipline offenders, and provide training in abuse prevention and detection.¹⁶⁹ The Charter instructs all dioceses to establish “safe environment” programs designed to educate children, parents, clergy, educators, and volunteers about child sexual abuse.¹⁷⁰

To implement this mandate, the National Catholic Risk Retention Group, a major provider of liability insurance for church entities, launched an independent nonprofit entity called VIRTUS in 2002, which provides a suite of in-person and online training programs.¹⁷¹ VIRTUS trainings have been adopted by more than 100 of the 195 Catholic dioceses in the U.S.¹⁷² As of 2022, the program has employed more than 25,000 trained facilitators who have conducted 220,000 trainings for more than 5.5 million adult employees and volunteers.¹⁷³ Catholic Mutual, the largest provider of liability insurance to Catholic Church entities in North America, recently launched CMGConnect, an online platform that provides training to dioceses, facilitates background checks, and helps with record keeping.¹⁷⁴ Some dioceses rely on other commercial and self-generated training programs to comply with the USCCB’s safe environment mandate.¹⁷⁵

168. See Timothy D. Lytton, *Exposing Private Third-Party Food Safety Auditors to Civil Liability for Negligence: Harnessing Private Law Norms to Regulate Private Governance*, 27 EUR. REV. PRIV. L. 353, 374–76 (2019) (citing examples of tort liability exposure improving the quality and consistency of professional services).

169. LYTTON, *supra* note 2, at 124–27 (tracing the history of policies promulgated by the U.S. Conference of Catholic Bishops in response to clergy sexual abuse litigation).

170. U.S. CONF. OF CATH. BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 10 (2002), <https://perma.cc/7347-U5LL>.

171. *What are the VIRTUS Programs?*, VIRTUS ONLINE, <https://perma.cc/C99Q-5GPA> (last visited Aug. 17, 2022). Development of VIRTUS began in 1998, prior to the bishops’ adoption of the Dallas Charter. E-mail from Crispin Montelione, Assoc. Dir. VIRTUS Programs, Nat’l Risk Retention Grp., to author (Aug. 25, 2022) (on file with author).

172. E-mail from Crispin Montelione, *supra* note 171.

173. *Id.*

174. *125 Years of Service to The Church*, CATH. MUTUAL GRP., <https://perma.cc/YEU3-YBQ2> (last visited Aug. 17, 2022); CMGCONNECT, <https://perma.cc/S7NP-6ZCU> (last visited Aug. 26, 2022); E-mail from Pat Neal, Dir. VIRTUS Programs, Nat’l Risk Retention Grp., to author (Aug. 22, 2022) (on file with author).

175. U.S. Conference of Catholic Bishops, *2020 Safe Environment Training Program Compilation*, <https://perma.cc/8UK2-VPU9> (last visited Feb. 19, 2023). See also SECRETARIAT OF CHILD

The BSA instituted Youth Protection Guidelines in 1998 as the number of sexual abuse allegations dramatically increased during media coverage of a trial that first uncovered the organization's Confidential Files.¹⁷⁶ The guidelines include training for institutional leaders about preventing sex abuse. Following the 2010 Portland, Oregon, verdict, the BSA revised the guidelines to require all volunteers to complete youth protection training every two years.¹⁷⁷ The BSA also appointed a former detective experienced in investigating child sexual abuse to a new position in the organization, Youth Protection Director, and it instituted a new policy requiring that all allegations of sexual abuse be reported to law enforcement.¹⁷⁸

Publicity surrounding the Larry Nassar scandal prompted Congress to pass the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017.¹⁷⁹ The act requires all employees and volunteers engaged in entities affiliated with national sporting bodies, such as USAG, to report reasonable suspicions or knowledge of child abuse to law enforcement within twenty-four hours. To comply with the act, USAG published a Safe Sport Policy detailing rules governing travel, communications, photography, locker rooms, gifting, and physical therapy, designed to prevent sexual abuse.¹⁸⁰

Although such efforts are desirable, a focus on institutional reform can work against survivors' efforts to focus public attention on institutional officials' misconduct. Bishops announced new reforms in the 1980s, 1990s, and again in the early 2000s, in repeated attempts to reframe their role in the scandal from covering up and facilitating abuse to reforming the Church and fixing the problem.¹⁸¹ They frequently pointed to declines in abuse rates following reforms to suggest that they had resolved the problem even as they continued to conceal information from public authorities and to resist civil discovery.¹⁸² The

AND YOUTH PROT., NAT'L REV. BD., U.S. CONF. OF CATH. BISHOPS, 2020 ANNUAL REPORT: FINDINGS AND RECOMMENDATIONS 3–11 (2021), <https://perma.cc/S8UG-KZCP> (reporting on implementation of the USCCB's safe environment mandate).

176. BOYLE, *supra* note 42, at loc. 4684–95. *See also* Cubellis, *supra* note 37, at 39–42 (summarizing the history of BSA youth protection standards).

177. Cubellis, *supra* note 37, at 39. *See also* *Youth Protection*, BOY SCOUTS OF AM., <https://perma.cc/JX58-JBD5> (last visited Aug. 17, 2022).

178. BOYLE, *supra* note 42, at loc. 4828 (describing appointment of Youth Protection Director); *Youth Protection*, *supra* note 177 (requiring immediate reporting of suspected abuse to law enforcement).

179. Pub. L. No. 115-126, 132 Stat. 318.

180. USA GYMNASICS, SAFE SPORT POLICY 13–17 (2019), <https://perma.cc/3DHP-TNL8>.

181. LYTTON, *supra* note 2, at 124–27 (detailing USCCB reforms in the 1980s, 1990s, and 2000s).

182. Lytton, *Catholic Bishops Still Don't Get It*, *supra* note 27 (quoting Chicago archbishop Cardinal Blase Cupich's statement in response to the Illinois Attorney General's report detailing

BSA has similarly sought to project an image of earnest reform to counter survivors' efforts to establish a narrative of decades-long coverup.¹⁸³ USAG survivors accused the organization of hypocrisy and cynicism when they touted a longstanding commitment to protecting athletes based on guidelines developed by an advisory committee on which Larry Nassar participated even after allegations of abuse had surfaced.¹⁸⁴

D. *Criminal Prosecution: The Complementary Function of Tort Litigation*

A fourth conception of accountability refers to paying a personal price. Under this conception, making a person accountable for wrongdoing means punishing them for their misconduct.¹⁸⁵ Tort litigation sometimes prompts criminal prosecution.

The coverup of child sexual abuse by powerful private institutions is often abetted by law enforcement. A mix of personal allegiance and fear of political repercussions explains the failure of police and prosecutors prior to the 1980s to investigate allegations of child sexual abuse by Catholic priests.¹⁸⁶ Eventually, tort litigation generated press coverage that shifted public attitudes regarding the veracity of allegations and the trustworthiness of Church officials, which motivated some law enforcement entities to take action and reduced the poten-

diocesan coverup of sexual abuse allegations that “the vast majority of abuses took place decades ago”).

183. See, e.g., *The BSA's Commitment to Safety*, BOY SCOUTS OF AM., <https://perma.cc/27YQ-25BN> (last visited Aug. 18, 2022).

184. E.g., Aly Raisman, *Full Text of Aly Raisman's Statement*, N.Y. TIMES (Jan. 20, 2018), <https://perma.cc/MH88-3H4E>.

185. See Hershovitz, *Harry Potter*, *supra* note 107, at 104 (discussing punishment as an expression of corrective justice).

186. PHILIP JENKINS, *PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS* 14 (1996) (explaining that, prior to the Gauthé case in 1984, police and prosecutors failed to intervene in cases of clergy sexual abuse because they were “reluctant to offend so powerful a constituent as the local Catholic church”). See also, e.g., *id.* at 45 (describing the failure of a New Orleans district attorney to take action against a local priest who produced pornographic videos recording sexual encounters in the parish rectory between himself and several teenage boys so as not to embarrass what the district attorney called “Holy Mother the Church”); FRANCE, *supra* note 1, at 129 (relating how an allegation of child sexual abuse by a priest to a police department in a Boston suburb was referred to the department’s chaplain, a Roman Catholic priest, and no further action was taken); BRUNI & BURKETT, *supra* note 1, at 176 (describing how a district attorney in Austin, Texas, acquiesced to a request by the bishop to refrain from charging a local priest following his arrest for child sexual abuse). On the phenomenon of administrative capture, see generally PREVENTING REGULATORY CAPTURE (David A. Moss & Daniel Carpenter eds., 2014).

tial political cost of doing so.¹⁸⁷ Since 2002, twenty-three state attorneys general have conducted investigations,¹⁸⁸ and prosecutors in four jurisdictions have pursued criminal charges against bishops and other episcopal officials for the coverup and facilitation of child sexual abuse by priests.¹⁸⁹ In an additional four cases, bishops agreed to publicly admit wrongdoing, enter counseling programs, submit to audits, and implement institutional reforms in exchange for prosecutors dropping criminal charges.¹⁹⁰ In three cases, Church officials pled guilty or were convicted.¹⁹¹

A similar pattern occurred in the USAG scandal. In 2004, local police dismissed a complaint against Nassar after interviewing him without making any effort to verify his responses to questioning.¹⁹² In 2014, a Michigan State University police investigation of sexual abuse allegations against Nassar did not follow up on important leads and produced no findings.¹⁹³ According to a 2021 report by the Department of Justice Office of Inspector General, a subsequent FBI investigation “failed to respond to allegations of sexual abuse by . . . Nassar with the urgency that the allegations required” and FBI field officials subsequently “provided incomplete and inaccurate information” to federal investigators “to make it appear that they had been diligent in responding to sexual abuse allegations.”¹⁹⁴ The FBI special agent working on the investigation communicated with the CEO of USAG about a potential job opportunity with the U.S. Olympic Commit-

187. JENKINS, *supra* note 186, at 14, 36, 48–49 (noting the increasing willingness of police and prosecutors to intervene in cases of clergy sexual abuse following the rise of civil lawsuits).

188. *23 State AGs Investigating Sexual Abuse in the Catholic Church*, CHILDUSA (Aug. 4, 2022), <https://perma.cc/2ZKH-LLX3>.

189. *Partial List of Criminal and Civil Cases Brought by Public Prosecutors against U.S. Catholic Officials for Enabling Child Sexual Abuse*, BISHOPACCOUNTABILITY.ORG (Feb. 1, 2019), <https://perma.cc/3SMX-LH23> (describing charges against episcopal officials in Philadelphia; Cincinnati; St. Paul, Minnesota; and Kansas City as well as officials of the Franciscan order in Hollidaysburg, Pennsylvania). This accounting does not include criminal prosecution of bishops and other diocesan officials for sexual abuse that they personally committed. *E.g.*, Sacha Pfeiffer, *Ex-Cardinal McCarrick has been Charged with Sexually Assaulting a Teen in the '70s*, NPR (July 29, 2021), <https://perma.cc/76U8-N3JG>.

190. *Partial List of Criminal and Civil Cases*, *supra* note 189 (describing agreements in Boston; Phoenix; Manchester, New Hampshire; and Santa Rosa, California).

191. *Id.* (detailing the conviction of Bishop Robert W. Finn in Kansas City, Missouri; the conviction of Monsignor William J. Lynn in Philadelphia, subsequently overturned; and the guilty plea of the Archdiocese of Cincinnati).

192. BARR & MURPHY, *supra* note 57, at 110.

193. *Id.* at 177–78.

194. *DOJ OIG Releases Report of Investigation and Review of the FBI's Handling of Allegations of Sexual Abuse by Former USA Gymnastics Physician Lawrence Gerard Nassar*, DEP'T JUSTICE, OFF. INSPECTOR GEN. (July 14, 2021), <https://perma.cc/8P5Y-84MB>; BARR & MURPHY, *supra* note 57, at 193–96.

tee.¹⁹⁵ Media coverage of the scandal unleashed by tort claims against USAG eventually led to criminal indictments against top USAG officials and administrators at Michigan State University.¹⁹⁶ Larry Nassar's nationally televised state court criminal sentencing hearing featured more than 150 victim impact statements.¹⁹⁷ Those proceedings amplified and endorsed survivors' stories.

The BSA's Perversion Files contain records of police agreeing to forego criminal charges against molesters so long as they resigned from scouting.¹⁹⁸ Scouting officials convinced local law enforcement officers to shield convicted abusers from media exposure.¹⁹⁹ A review of civil cases involving allegations of sexual abuse against the BSA by the Michigan attorney general has served as the basis for criminal indictments.²⁰⁰

III. THE VIRTUES OF TORT LITIGATION

Elsewhere, I have written at length about how tort litigation enhances policymaking by framing social problems in terms of institutional failure, uncovering policy-relevant information through civil discovery, and giving prominence to issues on the agendas of legislatures and government agencies.²⁰¹ In this Article, I want to draw attention to two additional, underappreciated, beneficial aspects of tort litigation. They are underappreciated because they are typically cited by critics as reasons for dispensing with tort law altogether.

Critics of tort litigation frequently argue that it is redundant and unreliable. According to these critics, tort litigation is redundant because there are more effective and efficient means of achieving its expressive, compensatory, and deterrent aims.²⁰² Public disapproval of misconduct is more forcefully expressed through criminal punishment than through tort claims, most of which settle, often without an admis-

195. *DOJ OIG Releases Report*, *supra* note 194; BARR & MURPHY, *supra* note 57, at 194.

196. Ethan May & Marisa Kwiatkowski, *Ex-Michigan State President latest to face Criminal Charges in the USA Gymnastics Scandal*, *INDY STAR* (Nov. 21, 2018), <https://perma.cc/3JEV-RRGD>.

197. Briannie Kraft, *Victim Impact Statements and the Case of Larry Nassar*, *SYRACUSE L. REV. ONLINE* (Feb. 1, 2018), <https://perma.cc/QQH4-HUF6>.

198. BOYLE, *supra* note 42, at loc. 2171.

199. *Id.* at loc. 2134–70.

200. Colin Jackson, *Michigan Attorney General Announces First Charges in Boy Scouts Abuse Investigation*, *AP* (Mar. 9, 2022), <https://perma.cc/Z444-YCHX>.

201. LYTTON, *supra* note 2, at 190; Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 *TEX. L. REV.* 1837, 1838 (2008).

202. *See infra* notes 203–206.

sion of wrongdoing on the part of the defendant.²⁰³ Compensation for injuries is more efficiently achieved through first-party insurance than through tort litigation, which entails considerable transaction costs, including contingency fees that are deducted from an injury victim's recovery.²⁰⁴ Deterrence of future harm is more effectively accomplished through administrative regulation than through liability exposure, which is contingent on many factors unrelated to the dangers posed by an actor's conduct, such as the "moral luck" of causing harm to another.²⁰⁵ Critics argue that tort litigation is unreliable because its performance of these functions relies on injury victims to file lawsuits, but only a small fraction of them actually do so.²⁰⁶

Notwithstanding the merits of these criticisms, tort claims for the cover-up of child sexual abuse reveal that redundancy and reliance on the willingness of injury victims to sue are, in at least some contexts, virtues, not vices, of tort litigation. Redundancy provides injury victims a means of recourse when law enforcement and administrative regulation fail. Reliance on injury victims gives injury victims control over the response to their experience of trauma, which has therapeutic benefits. The discussion that follows elaborates how these two underappreciated virtues of tort litigation have served sexual abuse survivors.

203. See, e.g., STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* 53–63 (1989); (asserting that tort law typically fails to express norms of corrective justice); KAGAN, *supra* note 8, at 171–74 (describing how tort law is inconsistent with popular attitudes about moral responsibility).

204. SUGARMAN, *supra* note 203, at 35–49, 128–48, 211 (arguing that tort law is an ineffective, inefficient, and inconsistent means of compensating injury and proposing to replace tort law with social insurance and employee benefits); KAGAN, *supra* note 8, at 147, 158–66 (alleging that the U.S. tort system is "a costly, erratic, inefficient, and often inequitable way of adjudicating normative disputes and compensating injured people" compared to bureaucratically administered social insurance programs in other industrialized countries).

205. SUGARMAN, *supra* note 203, at 3–24, 153–60, 211 (1989) (challenging deterrence justifications of tort law and discussing the advantages of administrative regulation over tort law as a means of reducing the risk of accidents); KAGAN, *supra* note 8, at 166–71, 179 (characterizing the deterrent effects of tort law as inefficient and erratic compared to administrative regulation). On moral luck and tort liability, see Tony Honoré, *Responsibility and Luck—The Moral Basis of Strict Liability*, *LAW Q. REV.* 530, 530–53 (1988).

206. KAGAN, *supra* note 8, at 158 (noting that "most victims of medical malpractice or product injuries or parking lot muggings do not file claims and do not recover anything"). See also William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC. REV.* 631 (1980–1981) (explaining that only a small fraction of potential tort claimants file lawsuits).

A. Redundancy

State and federal statutes task law enforcement and child welfare agencies with investigation, prosecution, and prevention of child sexual abuse.²⁰⁷ However, in each of the scandals discussed above, this administrative infrastructure failed to protect survivors or pursue perpetrators. Bishops, BSA leadership, and USAG officials did not report allegations²⁰⁸ and sometimes even enlisted local police and federal investigators to prevent the prosecution of perpetrators or public disclosure of abuse.²⁰⁹ These institutional leaders leveraged political influence, religious faith, admiration for the mission of their organizations, and trust in their moral judgment to capture government agencies responsible for youth protection.²¹⁰

Tort litigation provides survivors a means of overcoming this type of administrative capture. Plaintiffs' attorneys are largely immune from the political influence that powerful institutional actors exert on government officials. Unlike prosecutors and police, plaintiffs' attorneys are neither elected nor do they depend on the approval of political officeholders. Contingency fees give plaintiffs' attorneys financial incentive to pursue large settlements or jury verdicts for their clients.²¹¹ Attracting media attention to survivors' stories and using civil discovery to compel disclosure concerning the details of misconduct increase the value of their clients' claims.²¹² Plaintiffs' attorneys have ethical obligations to advance their clients' interests and, in many cases, personal reasons for wanting to make powerful institutional leaders accountable for their misconduct.²¹³ This is not to say that plaintiffs'

207. *Links to State and Tribal Child Welfare Law and Policy*, CHILD WELFARE INFO. GATEWAY (May 2021), <https://perma.cc/PN6F-UBCZ>; *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption*, CHILD WELFARE INFO. GATEWAY (May 2019), <https://perma.cc/U89B-NDSC>.

208. *See supra* notes 10, 24, 37-41, 59-60.

209. *See supra* notes 17, 44, 63, 186, 192-195, 198-199.

210. *E.g.*, Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, 132 Stat. 318. For essays on various forms of administrative capture, *see generally* PREVENTING REGULATORY CAPTURE, *supra* note 186.

211. *See* Patricia Munch Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. OF ECON. 213, 213-24 (1983) (modeling the incentive that a contingency fee gives to a plaintiff's attorney to engage in zealous representation).

212. *See* Claire S. H. Lim, *Media Influence on Courts: Evidence from Civil Case Adjudication*, 17 AM. L. & ECON. REV. 87, 118-19 (2015) (finding that media coverage increases the amount of damages awarded in civil cases).

213. *See, e.g.*, BARR & MURPHY, *supra* note 57, at 130-31 (detailing the sexual abuse of John Manly in childhood by priests). *See also* LYTTON, *supra* note 2, at 153 (discussing personal experiences with sexual abuse as a motivation for plaintiffs' attorneys).

attorneys are not subject to conflicts of interest²¹⁴ or ethical lapses that may lead them to disserve their clients, but they typically have compelling reasons to champion the cause of their clients when law enforcement and government agencies turn a blind eye.

Critics of tort litigation are right to point out that it performs many of the same functions as criminal law and administrative regulation. However, this may turn out to be a virtue rather than a vice. When powerful institutional actors impede the proper functioning of the criminal justice system and government regulators, tort litigation provides an available means of making wrongdoers legally accountable and providing compensation to their victims. When law enforcement and child welfare agencies failed survivors of child sexual abuse, tort litigation offered them a means of making accountable institutional leaders who betrayed them. Redundancy has long been viewed as a virtue in safety engineering and organizational systems.²¹⁵ It is also a virtue of tort litigation.

B. Agency

Even if one accepts the view that, in most circumstances, the various functions of tort litigation could be better performed by other institutions, tort litigation would still have something going for it that the alternatives lack. Tort litigation puts injury victims in the driver's seat.²¹⁶ Tort litigation gives injury victims power.²¹⁷ Filing a complaint allows injury victims to tell their stories as they wish to tell them and enhances their ability to attract media coverage.²¹⁸ Civil discovery puts injury victims in charge of investigating the misconduct they blame for their injuries.²¹⁹ Settlement negotiations empower injury victims to decide for themselves what constitutes an adequate rem-

214. See LESTER BRICKMAN, *LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA* 107–34 (2011) (analyzing conflicts of interest created by contingency fees).

215. David M. Clarke & Ian Hollister, *Introduction to Redundancy*, 30 *SAFETY & RELIABILITY* 4, 4–15 (2010) (explaining the value of redundancy in engineering); Calvin L. Streeter, *Redundancy in Organizational Systems*, 66 *SOC. SERV. REV.* 97, 97–109 (1992) (arguing that redundancy can be a virtue of organizational systems).

216. See Hershovitz, *Harry Potter*, *supra* note 107, at 102 (observing that tort law, unlike administrative regulation, “gives ordinary folks the right to hale virtually anyone into court, where they can seek explanations and evidence, an ascription of responsibility, and, yes, compensation too”).

217. *Id.* at n.105.

218. See *supra* notes 108–109, 120, 131 and accompanying text discussing how and why tort claims attract and frame media coverage.

219. *E.g.*, *supra* notes 129–130 and accompanying text describing how plaintiffs deposed institutional leaders and compelled them to divulge the contents of confidential personnel files.

edy²²⁰ and how far to pursue a dispute, and trial gives them the option to submit their claims to a neutral third-party. Critics have justifiably lamented the loss of injury victims' agency in the context of aggregated mass tort litigation,²²¹ but these traditional features of tort litigation are characteristic of lawsuits for corporate coverup of child sexual abuse.²²²

The power to steer the process by which claims are articulated, publicized, investigated, negotiated, and resolved is especially important to survivors of sexual abuse who have been betrayed by trusted institutional leaders. Tort litigation helps survivors address the experience of disempowerment that the abuse and subsequent institutional repression imposed on them. The benefit of tort litigation for survivors of sexual abuse and institutional betrayal lies not only in the outcomes of the process but also, and perhaps even more importantly, in the opportunity to be the protagonist directing it.

Breaking the silence surrounding abuse, controlling the narrative, and forcing those responsible to account for their actions helps sexual abuse survivors regain a sense of agency and heal from the trauma.²²³ Jennifer Balboni, the author of a book on clergy sexual abuse survivors' experience of litigation, asserts that many victims find therapeutic value in litigation, even prior to filing, in the initial client interviews with attorneys willing to listen to them and believe their allegations.²²⁴ David Clohessy, former longtime executive director of the Survivors Network for those Abused by Priests, explains that merely filing a lawsuit, regardless of the outcome, can have therapeutic value for victims. According to Clohessy:

If you want to relieve yourself of some of the shame. If you want people to know that Father Mike is dangerous. If you want parents to not let their kids go to the movies with him. If you want to hold church leaders accountable. If you want to expose the truth. All of that happens the day that your lawsuit is filed For many vic-

220. E.g., Jesse O'Neill, *Boy Scouts' Deal with Holdout Abuse Victims Clears Way for \$2.7B Settlement*, N.Y. POST (Feb. 10, 2022), <https://perma.cc/9JVJ-DH3E> (detailing the role of survivors in negotiating a settlement with the BOA); Macur, *supra* note 135 (describing the role of survivors in negotiating a settlement with USAG); Vanessa Romo, *Minnesota Archdiocese Reaches \$210 Million Settlement with 450 Clergy Abuse Victims*, NPR (June 1, 2018), <https://perma.cc/TFR3-MXE4> (quoting survivors involved in negotiating a settlement with the Minnesota Archdiocese).

221. E.g., BURCH, *supra* note 4.

222. See *infra* notes 223–227 and accompanying text quoting sexual abuse survivors discussing their sense of empowerment as litigants.

223. BARR & MURPHY, *supra* note 57, at 241.

224. LYTTON, *supra* note 2, at 177; See also BARR & MURPHY, *supra* note 57, at 3 (describing how plaintiff's attorney John Manly validated the story of an abuse survivor in an initial client interview).

tims, [filing suit is] the first step toward taking action and putting the blame where it belongs and reclaiming your life.²²⁵

Confronting the Church through litigation is transformative, says John Manly:

[F]or a lot of survivors, this process is profoundly healing because it allows them to get their power back [F]or a survivor, it's a huge thing to be able to sit across the table from their perpetrator or sit across from the people who aided their perpetrator and confront them and walk out and be okay. And I've seen that process, along with a lot of therapy, change people's lives.²²⁶

Matt Stewart, a survivor of sexual abuse by his scoutmaster, describes the healing that litigation provides to survivors, “[h]ealing looks like the ability . . . to tell your story. It’s giving them a platform in order to share their experiences. Because when you can share things, then you can process things. And if you can process things, then you can have maybe somewhat of a normal life.”²²⁷

These therapeutic benefits of litigation tend to spread. Litigation encourages additional survivors to come forward.²²⁸ Survivors in all these scandals initially feared that, if they did come forward, they would not be believed and, if they spoke up, their stories would be suppressed.²²⁹ Litigation has assuaged many such doubts.²³⁰ High-profile civil litigation in the mid-1980s, the mid-1990s, and the early 2000s has spurred successive cascades of tort claims against Catholic dioceses.²³¹ The high-profile Portland, Oregon, case against the BSA in

225. LYTTON, *supra* note 2, at 177.

226. *Id.* at 177–78. See also Kraft, *supra* note 197 (describing the therapeutic value of victim impact statements in the trial of Larry Nassar).

227. Trisha L. Nadolny, ‘There’s No Rehabbing the Boy Scouts.’ *Former Scout Speaks Out about Latest Lawsuit*, USA TODAY (Aug. 12, 2019), <https://perma.cc/VQR7-M4LF>.

228. E.g., LYTTON, *supra* note 2, at 18, 25 (describing how litigation encouraged clergy sexual abuse survivors to come forward). Large numbers of survivors also came forward in the wake of the highly publicized Portland, Oregon, jury verdict against the BSA in 2010 and the initial lawsuits filed by survivors of abuse by Larry Nassar in 2016. See *supra* notes 48–52 and accompanying text discussing the increase in the volume of lawsuits against the BSA and notes 75–83 and accompanying text discussing the increase in the volume of lawsuits against USAG. See also TIMOTHY D. LYTTON, *OUTBREAK: FOODBORNE ILLNESS AND THE STRUGGLE FOR FOOD SAFETY* 98 (2019) (describing how tort litigation mobilized foodborne illness survivors and their families to advocate for policy reform); MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 3–12 (1994) (developing a general theory of how litigation mobilizes advocates of policy change).

229. LYTTON, *supra* note 2, at 138, 141, 143, 146, 158; BARR & MURPHY, *supra* note 57, at 3, 100, 194; BOYLE, *supra* note 42, at loc. 1381, 1530, 1650, 1696, 1826, 1930, 21703701, 4469.

230. LYTTON, *supra* note 2, at 18, 25, 158; BARR & MURPHY, *supra* note 57, at 215–216; Siemaszko, *supra* note 46.

231. LYTTON, *supra* note 2, at 13, 18, 37, 39–41.

2010 unleashed a tidal wave of 82,000 claims.²³² The Indianapolis Star's coverage of litigation against USAG encouraged more than 500 survivors to file claims.²³³

The framing of plaintiffs' claims as a search for truth and justice counteracted the sense of shame that prevented many survivors of clergy sexual abuse from coming forward.²³⁴ When survivors who were sexually violated by Larry Nassar under the pretense of medical treatment read about initial tort claims that described experiences similar to their own, some of them realized for the first time that they, too, were abused.²³⁵ Men who were sexually molested by scoutmasters have related how early civil claims against the BSA helped them realize that they were not to blame for their victimization.²³⁶

Litigation has mobilized survivors to form groups for mutual support and policy advocacy. Litigation fueled the growth of Survivors of those Abused by Priests²³⁷ and fostered community among the survivors of Larry Nassar, forty of whom went on to found an organization called The Army of Survivors.²³⁸ There is a symbiosis between plaintiffs' attorneys and such survivor groups. Survivors' groups comprise a community that provides a ready source of new clients for attorneys who, in turn, provide financial support for the groups.²³⁹ The two also share a strong common interest in promoting the welfare of survivors and advancing child-protection reforms.²⁴⁰

For some survivors, the aggregation of claims has diminished the therapeutic value of tort litigation. Aggregate settlements focus attention on the distribution of compensation funds among survivors based on the comparative monetary value of their claims, typically based on

232. *Supra* notes 49–56 and accompanying text describing the increase in litigation against the BSA following the 2010 Portland, Oregon, case.

233. *Supra* notes 67–83 and accompanying text discussing the increase in the volume of lawsuits against USAG following publication of the Indianapolis Star's initial coverage of litigation against the USAG.

234. LYTTON, *supra* note 2, at 158.

235. BARR & MURPHY, *supra* note 57, at 287.

236. Nadolny, *supra* note 227.

237. LYTTON, *supra* note 2, at 25.

238. BARR & MURPHY, *supra* note 57, at 225, 232; Kristen Jordan Shamus, *What 40 Larry Nassar Survivors are Building Together*, WKYC (July 27, 2018), <https://perma.cc/T8NZ-4LVG>.

239. Critics have characterized this symbiosis as a kickback scheme. Dennis Coday, *Sex Abuse Advocacy Group SNAP Sued by Former Employee*, NAT'L CATH. REP. (Jan. 18, 2017), <https://perma.cc/AFY7-C8TR>.

240. *See, e.g., SNAP Mission Statement*, SNAP, <https://perma.cc/Z4P5-FQ7E> (last visited Aug. 26, 2022); *Recognized as One of the Nation's Premier Law Firms Representing Victims of Childhood Sexual Abuse*, JEFF ANDERSON & ASSOCS., <https://perma.cc/KMF2-HXRT> (last visited Aug. 26, 2022).

the type and duration of abuse.²⁴¹ Some survivors of clergy sexual abuse have reported that the exercise of monetizing and comparing their injuries erodes the feelings of solidarity and mutual support developed through their experience of speaking out together.²⁴²

Bankruptcy further diminishes the therapeutic benefit of tort litigation for survivors. Bankruptcy settlements set deadlines for survivors to file claims, irrespective of state statutes of limitation, which may compel survivors to come forward years earlier than they feel ready, depriving them of the therapeutic benefit of control over when and to whom they disclose their experiences of abuse.²⁴³ Moreover, the “cramdown provision” of the bankruptcy code empowers courts to impose settlements over the objections of tort claimants so long as the judge considers the plan fair and equitable depriving survivors of control over negotiations.²⁴⁴

CONCLUSION

The aim of this Article has been to explain how tort litigation has empowered survivors of child sexual abuse to make accountable institutional leaders who covered up and facilitated their victimization. The Catholic Church, BSA, and USAG examples support generalizations about how tort litigation affords survivors the opportunity to obtain validation of their personal stories of abuse, monetary compensation for their injuries, institutional reforms to prevent corporate misconduct in the future, and criminal punishment for those who wronged them. This analysis reveals that two features of tort often characterized as defects are really virtues in this context. The redundancy of tort litigation turns out to be an essential backup when law enforcement and administrative regulation fail. The dependence of tort litigation on the initiative of injury victims empowers them to be the protagonists in their efforts to heal from the trauma of serious injuries.

241. *E.g.*, LYTTON, *supra* note 2, at 73.

242. *Id.* at 177.

243. Hamilton & Brainard, *supra* note 83, at 7; Hamilton et al., *supra* note 163, at 4.

244. *Relief from Tort Liability through Reorganization*, *supra* note 155, at 1234–35.